**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF NEW JERSEY**

| | |
|---|---|
| ANDY KIM, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>CHRISTINE GIORDANO HANLON, in her official capacity as Monmouth County Clerk, et. al.,<br><br>Defendants,<br>- and -<br><br>DALE A. CROSS, in his official capacity as Salem County Clerk, et al.,<br><br>as Interested Parties. | Civil Action No.: 24-1098 (ZNQ)(TJB) |

**MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION IN LIMINE NO. 1 TO EXCLUDE THE INTRODUCTION OR USE OF ANY EXPERT TESTIMONY AT THE EVIDENTIARY HEARING ON PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION**

*Of Counsel and on the brief:*
Angelo J. Genova, Esq.
Rajiv D. Parikh, Esq.
Jennifer Borek, Esq.

*On the brief:*
Daniel A. Lebersfeld, Esq.
Katherine Szabo, Esq.

**GENOVA BURNS LLC**
494 Broad Street
Newark, New Jersey 07102
Tel: (973) 533-0777
Fax: (973) 533-1112
*Attorneys for Defendants*
*Christopher Durkin, Joanne Rajoppi, and Danielle Ireland-Imhoff*

# TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES



## RULES

Defendants Christopher Durkin, Joanne Rajoppi, and Danielle Ireland-Imhof, in their official capacities (collectively, "Defendants") respectfully submit this memorandum of law in support of their motion of their motion *in limine* (Motion *In Limime* #1) to bar all of Plaintiffs' putative experts from testifying at the evidentiary hearing on Plaintiff's motion for a preliminary injunction scheduled for Monday, March 18, 2024 on the grounds of undue delay in disclosing their opinions.

## PRELIMINARY STATEMENT

Despite having engaged their experts as far back as December of last year, and in at least one case, having had a signed report in hand before the end of 2023, Plaintiffs sprung four purported expert reports on Defendants (containing over 120 pages excluding exhibits) as exhibits to the Verified Complaint with a delayed filing date of February 26, 2024.[1] These reports were heavily relied upon and referenced in Plaintiff's motion for emergent relief filed on February 26, 2024 that seeks to overturn New Jersey's longstanding statutorily mandated ballot design that has been the subject of litigation brought by the same attorneys, which has been pending before this very Court for years. Plaintiffs' eleventh-hour filing, which sought an expedited hearing, was clearly designed to shield those experts from any meaningful

[1] In addition, Plaintiffs submitted a "rebuttal report" from one of these experts on March 12, 2024 with their reply papers, and belatedly submitted an additional purported expert report from Ryan Macias on March 13, 2024, after the deadline to do so.

discovery in order to set up a classic trial by ambush. The Federal Rules of Civil Procedure and caselaw directly address, and forbid, Plaintiffs' bad faith stratagem. Accordingly, none of Plaintiffs proposed experts should be permitted to testify at the hearing on their motion for a preliminary injunction, nor should the Court consider their 'reports' in rendering a decision on Plaintiffs' pending emergent application.

## STATEMENT OF FACTS

For purposes of this motion *in limine*, Defendants presume the Court's familiarity with Plaintiffs' allegations and their claims for relief. It suffices to say here that Plaintiffs filed a Verified Complaint along with an application for a preliminary injunction on February 26, 2024 that seeks a "mandatory" injunction on an emergent basis that would force a redesign of New Jersey's longstanding and statutorily mandated primary election ballot design. (*See* Dkt. # 1, 5-7). Accompanying that application are four expert reports, authored by: (i) Dr. Samuel S-H Wang (Dkt. # 1-4); (ii) Dr. Josh Pasek, Ph.D (Dkt. #1-2); (iii) Dr. Julia Sass Rubin (Dkt. #1-3); and (iv) Andrew W. Appel (Dkt. # 1-5).

This suit was brought by the same counsel for the plaintiffs in the action entitled *Conforti, et al. v. Hanlon, et al.*, Civ. No. 20-8267 (ZNQ) (TJB), which was filed in this Court on or about July 6, 2020, and which likewise seeks an order declaring New Jersey's ballot design unconstitutional. *See generally Conforti v. Hanlon*, No. 20-08267, 2022 WL 1744774 (D. N.J. May 31, 2022). No experts were

identified in that litigation, and, on February 13, 2024 counsel for those plaintiffs asked for, and received, an extension of the time to serve discovery responses. (*See* Conforti Dkt. # 186).

On February 29, 2024, in this action, the Court ordered that an evidentiary hearing on Plaintiffs' motion for a preliminary injunction be held on March 18, 2024. (Dkt. # 34). Up until the filing of this motion, Defendants did not know about Plaintiffs intentions to seek relief in the middle of the current primary election process, did not have any meaningful opportunity to find their own proposed experts who could provide a substantive response in less than one week, and have not had the opportunity to take the depositions or seek meaningful discovery of Plaintiffs' proposed experts. Rather, in response to narrowly tailored discovery requests, on March 4, 2024 Plaintiffs' counsel provided what can only be described as a "document dump," which purported to contain materials upon which their putative experts apparently relied in formulating their opinions, and included, among other things, expert engagement letters, notes, raw data, studies and spreadsheets. (Dkt. # 120 at p.2).

At that time, it became evident that Plaintiffs had retained their experts months before they filed this action. Specifically:

- Mr. Appel, although formally engaged by Plaintiffs' counsel on or about January 22, 2025, began his work no later than December 18, 2023, and

provided Plaintiffs' counsel with a signed report on December 26, 2023 (Declaration of Jennifer Borek ("Borek Dec."), Exs. A & B) ;

- Dr. Wang, although formally engaged by Plaintiffs' counsel on or about January 22, 2024, began preparing his report no later than December 29, 2023 and had discussions regarding this matter with Plaintiffs' counsel as early as December 18, 2023 (Borek Dec. Exs. C, D, E)
- Dr. Pasek, although formally engaged by Plaintiffs' counsel on or about January 11, 2024, had discussions regarding this matter with Plaintiffs' counsel as early as December 18, 2023 (Borek Dec. Exs. C, F);
- Dr. Sass Rubin, although formally engaged by Plaintiffs' counsel on or about January 22, 2024, had discussions regarding this matter with Plaintiffs' counsel as early as December 23, 2023 (Borek Dec. Exs. C, G); and
- Plaintiffs' counsel served and filed a certification from Ryan Macias on March 13, 2024 purportedly in further support of its motion for a preliminary injunction after the Court imposed March 12, 2024 deadline for doing so (*see* Dkt. # 34, 115, 115-1).

## ARGUMENT

Because Plaintiffs seek the equitable remedy of preliminary injunctive relief, the admissibility of their putative experts' testimony at the hearing to determine whether that relief is appropriate is governed by the principle that any delay in filing

"undercuts the urgency that forms the cornerstone of injunctive relief; indeed, it indicates a lack of urgency." O*tsuka Pharm. Co. v. Torrent Pharms. Ltd., Inc.*, 99 F. Supp. 3d 461, 505 (D.N.J. 2015); *see also Graceway Pharms., LLC v. Perrigo Co.*, 697 F. Supp. 2d 600, 605 (D.N.J. 2010) (explaining that such extraordinary relief should not "be granted in the face of a movant's inequitable conduct, including laches, i.e., unjustified delay or dilatory conduct"). As the Supreme Court has held, this principle holds even firmer in cases that challenge election laws and procedures. *Benisek v. Lamone*, 585 U.S. 155, 159 (2018) ("a party requesting a preliminary injunction must generally show reasonable diligence. That is as true in election law cases as elsewhere.") (citations omitted). Whether Plaintiffs' undue delay in disclosing their putative expert's opinions should ultimately be analyzed in conjunction with their overall burden to meet a high standard of proof, given that they seek a "mandatory" injunction that seeks to upend, rather than preserve, the status quo by overturning a longstanding State election laws and procedures. *See Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (the *Purcell* principle requires a showing that "the underlying merits are entirely clearcut in favor of the plaintiff") (Kavanaugh, *J.* concurring); *Acierno v. New Castle Cnty.*, 40 F.3d 645, 653 (3d Cir. 1994) (plaintiffs seeking a "mandatory injunction" must meet "a particularly heavy burden demonstrating its necessity").

In a similar vein, Fed. R. Civ. P. 26(a)(2)(D)(i) provides that "[a]bsent a stipulation or court order," neither of which Plaintiffs obtained when they served

their putative expert reports, expert disclosures "must be made at least 90 days before the date set for trial or for the case to be ready for trial[.]" The purpose of the Rule "is to prevent unfair surprise at trial and to permit the opposing party to prepare rebuttal reports, to depose the expert witness in advance of trial, and to prepare for depositions and cross-examination at trial." *Minebea Co., Ltd. v. Papst*, 231 F.R.D. 3, 5-6 (D. D.C. 2005) (citations omitted).

Here, there can no dispute that Plaintiffs have unduly delayed and have otherwise not complied with Rule 26(a)(2)(D)(i)'s timeframe regarding the disclosure of their putative expert reports. As described above, Plaintiffs' counsel contacted their putative experts at least as early as December of last year, more than two months before disclosing their opinions in conjunction with their motion for extraordinary and supposedly emergent relief. Indeed, the limited information that Defendants have been able to obtain indicates that their putative experts had been preparing their reports as far back as December of last year, and, in the case of Mr. Appeal, had a signed report by him in hand on December 29, 2024, nearly two months before they filed suit herein. Thus, there can be no serious claim that the timeframe that Plaintiffs' eleventh-hour filing set up has prevented Defendants from taking depositions of those putative experts or preparing their own rebuttal reports as the Federal Rules of Civil Procedure contemplate.

Plaintiffs likewise have no basis to argue that any exigencies otherwise permitted their end-run around the rules and principles governing the timing of expert disclosure. Indeed, it is obvious that Plaintiffs themselves, and almost certainly by design, created any exigencies they might claim exist here. Specifically, the ballot design that Plaintiffs seek to emergently enjoin has been the subject of state court litigation going back decades, *see e.g.*, *Quaremba v. Allan*, 67 N.J. 1 (1975), and is the subject of pending litigation in *Conforti* almost four years ago, in which Plaintiffs' counsel obtained an extension of time to serve discovery requests before their filing here.

In sum, the foregoing demonstrates that Plaintiffs have no good faith argument that they proceeded diligently to give Defendants the opportunity to fully probe the opinions of their putative experts that they claim conclusively establishes their right to the extraordinary relief they have sought on a wholly unnecessary truncated timeline. To the contrary, it is obvious that they intentionally slow walked the disclosure of their experts' opinions in order to shield them from any meaningful discovery. The Court should not reward such a patently bad faith approach. Accordingly, the Cout should bar all of those putative experts from testifying at the hearing on Plaintiff's motion for a preliminary injunction.

## CONCLUSION

For all of the foregoing reasons, Defendants respectfully request that the Court grant their motion in *limine* and bar all of Plaintiffs' experts from testifying at the hearing on Plaintiffs' motion for a preliminary injunction.

Respectfully submitted,

**GENOVA BURNS LLC**
*Attorneys for Defendants, Christopher Durkin, Joanne Rajoppi, and Danielle Ireland-Imhof*

By: *s/ Angelo J. Genova*
ANGELO J. GENOVA
RAJIV D. PARIKH
JENNIFER BOREK

Dated: March 18, 2024

17462592v3 (9998.435)